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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TED DARNELL DANIELS, JR., Defendant and Appellant.	B172148 (Los Angeles County Super. Ct. No. NA056757)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Jean, Jr., Judge. Reversed.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller, Chung L. Mar and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Ted Darnell Daniels, Jr., challenges his aggravated assault on a peace officer conviction on the grounds the trial court erred by admitting evidence of auto burglaries he committed immediately prior to the assault and of stolen property the police recovered from him, failing to instruct sua sponte with CALJIC No. 2.52, and imposing the upper term on one count and consecutive sentences on other counts on the basis of facts not found by the jury. We conclude the court properly admitted evidence of the burglaries immediately preceding the assault and the recovery of property taken during those burglaries and found in appellant's vehicle. However, the court erred by admitting evidence of the recovery of additional property taken during other burglaries. The court also erred by failing to instruct the jury with CALJIC No. 2.52. The cumulative effect of these errors warrants reversal.

BACKGROUND AND PROCEDURAL HISTORY

Police officers conducting a surveillance of a parking structure at the Long Beach Airport saw appellant break into two vehicles and transfer items from inside those vehicles to his own SUV. As appellant approached the ticket booth to leave the parking lot, two plainclothes officers, John Bruce and Mario Razo parked their unmarked police car across the exit lane on the far side of the ticket booth. They got out of their car, pointed their guns at appellant, shouted that they were police officers, and ordered him to stop. When Detective Joseph Bahash drove up to block appellant's SUV from behind, Bruce moved onto a grassy area alongside the exit lane so that if he fired his gun, he would not strike Bahash. Appellant evaded their blockade by driving over the curb and onto the grassy area alongside the exit lane, and straight toward Bruce. Bruce moved to avoid being run over and fired one shot at appellant's SUV. Appellant's SUV struck Bruce's police vehicle, causing minor damage. Appellant eluded police officers in a high-speed chase, but was arrested a few hours later at his home.

Appellant pled nolo contendere to 14 counts of second degree burglary of a vehicle and one count of evading an officer with willful disregard of the safety of persons

or property. A jury convicted him of assault on a peace officer with a deadly weapon or by means of force likely to produce great bodily injury. The trial court sentenced appellant to seven years in prison.

DISCUSSION

1. The trial court erred by admitting irrelevant and prejudicial evidence regarding the recovery of stolen property other than that taken during the observed burglaries or recovered from the SUV appellant used in the assault.

Prior to trial, appellant sought to exclude, under Evidence Code section 352, evidence of the vehicular burglaries, the high-speed chase, and the stolen property subsequently recovered by the police. Apart from evidence that appellant was armed with a gun, the trial court agreed to admit all of the challenged evidence, stating that it was relevant to motive and was more probative than prejudicial.

Detectives Joseph Bahash and Jacinto Ponce testified that before the charged assault on Detective Bruce, they watched appellant break into a Cadillac Escalade, from which he took four spinning wheel covers and an unidentified item from the interior. He placed these items in his own SUV. He then broke into a Chevrolet Tahoe. He took several unidentified items out of the Chevrolet Tahoe and placed them in his own SUV.

After the police arrested appellant at his home, they searched his bedroom. Detective Ponce testified they recovered several briefcases, two DVD monitors for vehicles, numerous CDs, a portable CD player, stereo equipment, headphones, a watch, and a mobile phone. From appellant's SUV, the police recovered a DVD player and monitor, a CD changer, remote controls, and a burglary tool called a "slim jim." However, some of the items were installed in appellant's SUV. From the home of appellant's friend, Marco Madrid, the police recovered spinning wheel covers, license plates from appellant's SUV, two car stereos, four DVD monitors, and two DVD players for vehicles. Stereos, CDs, DVDs, and appellant's driver's license were recovered from Madrid's vehicle.

Appellant's friend, Gary Garland, testified that appellant telephoned him at about 4:30 a.m. on the morning of the incident. Appellant told Garland that he had wrecked his SUV and asked Garland to pick him up. Garland helped appellant transfer some items, including spinning wheel covers, DVDs, and stereo equipment, from appellant's SUV to Garland's truck. Appellant also removed the license plates from his SUV and brought them with him. He told Garland he was fleeing from the police when he crashed his SUV. At appellant's request, Garland drove appellant to the home of a friend, where appellant unloaded some of the items from his SUV. Garland then drove appellant home. As they approached, appellant bent down and said something about making sure the police were not there.

Appellant did not testify. The defense theory argued by counsel was that appellant did not see Detective Bruce because it was dark and visibility was poor as a result of rain. Alternatively, if appellant saw Bruce, he did not know Bruce was a peace officer. Evidence supporting the defense theories included testimony by Detectives Bruce and Razo that it was raining at the time of the incident. All witnesses who were asked the question testified that it was dark at the time of the incident, which occurred at about 4:45 or 5:00 a.m. Bruce and Razo testified the car they pulled in front of appellant to block his exit was unmarked, and they were not dressed in police uniforms, but instead wore black police "raid" jackets. Their jackets had police emblems on each shoulder and on the chest. Although they testified they wore their police badges on cords around their necks, they did not state whether their badges were hanging inside or outside of their jackets. Bruce and Razo further testified they made eye contact with appellant as they approached his SUV and shouted that they were police officers.

Appellant contends the trial court erred by admitting evidence of the two burglaries observed by the police and the subsequent recovery of the apparently stolen property.[1] He argues that the evidence was irrelevant to the assault charge, which was

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[1] Although he sought exclusion of the chase evidence at trial, on appeal appellant

the sole charge before the jury, assault, and that the evidence was highly prejudicial. He further argues the admission of the evidence violated due process.

Generally, we review any ruling on the admissibility of evidence for abuse of discretion. (See, e.g., *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) This standard of review applies to both a trial court's determination of the relevance of evidence and its determination under Evidence Code section 352 whether the evidence's probative value is substantially outweighed by its prejudicial effect. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.) Evidence that appellant committed vehicular burglaries immediately prior to the assault on Detective Bruce was relevant to show appellant's motive for the assault, i.e., to escape capture or, if he did not suspect that the police had observed the burglaries, to prevent the police from seeing the stolen property in his SUV, thereby avoiding detection and capture. Although motive is not an element of the offense, proof of motive is always relevant in a criminal prosecution. (*People v. Perez* (1974) 42 Cal.App.3d 760, 767.) The evidence was also relevant to show that Bruce was engaged in the performance of his duties as a peace officer, in that he was attempting to make a lawful arrest of someone who had just committed a felony by entering locked vehicles to steal property from within them. That Bruce was engaged in the performance of his duties as a peace officer at the time was an element of the charged crime of aggravated assault on a peace officer. (Pen. Code, § 245, subd. (c).)

Relevant evidence should be excluded, however, if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of

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does not contend that the trial court erred by admitting evidence regarding the high-speed chase, which included running red lights, driving in excess of 120 miles per hour, and driving straight toward one of the pursuing police vehicles.

undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code, § 352.) In this context, unduly prejudicial evidence is evidence that evokes an emotional bias against the defendant without regard to its relevance to material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) The probative value of evidence of motive generally exceeds its prejudicial effect, and the trial court has wide latitude in admitting evidence of the existence of a motive. (*People v. Beyea* (1974) 38 Cal.App.3d 176, 195.) Evidence of motive is admissible even when it may show that the defendant has committed other offenses. (*People v. Morales* (1979) 88 Cal.App.3d 259, 264.)

The testimony of Detectives Bahash and Ponce regarding the burglaries they observed was extremely brief and general. There was no suggestion that appellant damaged either vehicle. Although the evidence clearly revealed appellant committed other crimes, they were merely crimes against unoccupied property, which was in no way similar to the assault upon Detective Bruce. The evidence had no tendency to evoke an emotional bias against appellant, especially in comparison to evidence that he drove straight at Detective Bruce, creating a risk of great bodily injury or death. The only risk created by admission of the evidence was that the jury might believe that appellant had not been punished for the burglaries. However, given the obvious difference in gravity between breaking into a parked, unoccupied car and attempting to run over a police officer, there was no real risk the jury would convict appellant of the assault simply because it believed he should be punished for breaking into the two vehicles. Had appellant requested it, the court would, no doubt, have given a limiting instruction regarding the burglaries.

Evidence of the subsequent recovery of stolen property was largely irrelevant to the assault charge. Evidence regarding the recovery of the property found stored, as opposed to installed, in appellant's SUV and the spinning wheel covers the detectives saw him remove from one of the vehicles would have tended to show motive in the same fashion as the evidence of the observed burglaries. The prosecution went far beyond that, however, and proved the recovery of a multitude of items from three locations, clearly

implying that the two observed burglaries were not the only ones appellant had committed. Strengthening the inference to be drawn from the quantity of recovered property was testimony by Detective Razo that the police undertook the surveillance operation at the airport parking garage because "numerous auto burglaries" had occurred there. Detective Bahash reinforced Razo's testimony by testifying that the surveillance in which he was participating was a result of "auto burglaries that were occurring" in the parking structure. The inclusion of items installed in appellant's SUV among the evidence of recovered property also suggested the police had knowledge of other burglaries committed by appellant because the surveillance testimony did not suggest appellant took the time that morning to install any equipment he removed from the two burglarized vehicles into his own SUV. Evidence that appellant had possession of items taken in burglaries other than the two observed by the detectives had no tendency in reason to prove appellant's motive, any element of the assault charge, or appellant's identity as the perpetrator of the assault. Additionally, such evidence did not tend to disprove his theory of the defense. It was relevant only to proof of the vehicular burglary charges that had already been resolved by plea. Accordingly, the trial court should have excluded as irrelevant evidence of the recovery of all items of stolen property except those found stored, but not installed, in appellant's SUV and the spinning wheel covers.

Evidence of the recovery of property taken during the two observed burglaries immediately prior to the assault created no additional risk of prejudice beyond that inherent in evidence of the two burglaries. The remainder of the recovered property showed that appellant had committed numerous other vehicular burglaries. It therefore created two related risks: that the jury would deem appellant to be a hardened, professional criminal predisposed to commit crimes and that it would feel he had escaped punishment for numerous other crimes. This risk of undue prejudice necessarily substantially outweighed the non-existent probative value of the evidence. For this

reason, also, the trial court erred by admitting this evidence.[2]

2. The trial court erred by failing to instruct, sua sponte, with CALJIC No. 2.52.

Appellant contends the trial court erred by failing to instruct, sua sponte, with CALJIC No. 2.52, which provides as follows: "The [flight] [attempted flight] [escape] [attempted escape] [from custody] of a person [immediately] after the commission of a crime, or after [he] [she] is accused of a crime, is not sufficient in itself to establish [his] [her] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

CALJIC No. 2.52 satisfies a statutory requirement that "[i]n any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt," the trial court must instruct that evidence of flight is itself insufficient to establish the defendant's guilt. (Pen. Code, § 1127c.)

Respondent argues the instruction was not required because the prosecution did not rely upon evidence of flight to show consciousness of guilt. However, the prosecutor argued repeatedly that appellant's flight constituted proof of his state of mind, which in turn established several elements of the assault charge. First, she argued that it showed that appellant knew Detective Bruce was a peace officer engaged in the course of his duties: "Defendant reasonably knew that the peace officer was in the course of his duties. [¶] How do we know what is in the defendant's mind? We look at all the evidence taken together. [¶] What did the defendant do? He pulls up to the arm. The two peace officers get out. They both have their badges around their necks, guns drawn, 'Freeze, police, police, freeze.' [¶] What does he do? Immediately gets out of there. 'I am not going to jail.' And he flees. Obviously knowing they were police officers, which is why he is trying to get out of there." The prosecutor later argued that appellant's flight

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[2] The prejudicial effect of this error is considered in the third section of this opinion.

was important because "[i]t shows what's going on in the defendant's mind. There is someone who knows what's going on. He knows he is in trouble. And he knows he is not going to get caught. And he is going to do whatever it takes to get out of trouble, including driving his car directly at a police officer whether or not that police officer is getting out of the way in time, he is going to drive that car. If he has to hit him, he is going to hit him because he is going to get away."

In her closing argument, the prosecutor again argued that appellant's flight reflected upon his state of mind: "That's what they want you to believe is the defendant, for some reason, spontaneously went on the grass and drove away and didn't see any of the police officers. [¶] After he got away he kept going at 120 miles an hour on the freeway with police officers chasing him and just kept going because he never saw the police. He didn't do anything wrong. . . . [¶] Why would he do that? The defense wants you to believe that we didn't really prove why he did that. . . . [¶] [T]he only reasonable explanation for what happened is the defendant pulled up, he saw the police get out of their car. He knew they were police because he had damages [*sic*]. And they were yelling 'freeze, police' and pointing a gun at him. [¶] When he saw that, he thought, 'I am not going to jail. I am not going to get caught. I am out of here.' And he drove up over that curb. And he drove directly to Officer Bruce who was also yelling 'freeze, police, freeze, police.' . . . And the defendant, seeing Officer Bruce, is thinking, 'I am not going.' And he keeps driving until Officer Bruce gets out of the way, fires a shot. And he still doesn't stop and he keeps going. [¶] Why does he keep going? 'Because I just almost ran over a police officer and I am going to get in big trouble for that. So I am going to get away and do whatever it takes to stay out of jail.' [¶] So he drives 120 miles on the freeway with patrol officers following him. They would do that because they know they are in big trouble.[3] Not only did they break into cars, but they almost ran over a police officer. He crashes the car. He goes home. He is still hiding in the back of his

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[3] Despite the prosecutor's use of plural pronouns, no evidence suggested appellant

car on the way home. All of that is important because it goes to show his mind frame. That's the reasonable interpretation of the evidence."

Clearly, the prosecutor relied upon appellant's flight as part of her proof of his guilt. Her reliance upon flight was not just to show appellant's consciousness of guilt, but to show that appellant actually saw Detective Bruce standing on the grass and was aware that Bruce was a police officer performing his duties when appellant drove toward him. Respondent argues that no flight instruction was required because the "focus of the prosecutor's argument was appellant fled to avoid apprehension for the burglaries, not the assault." Although appellant's flight may well have been attributable to the burglaries, not to the assault, the prosecutor made no such distinction in her argument. She relied heavily upon flight as proof of appellant's guilt of assault and expressly speculated that appellant fled because he thought, "I just almost ran over a police officer." It is doubtful the jury would ignore the prosecutor's arguments because it deemed appellant was fleeing from the burglaries, rather than the assault. Moreover, while the flight around the parking lot gate and the blocking police car may have been attributable solely to the burglaries, the subsequent continued flight, including the high-speed chase to which the prosecutor repeatedly referred, must be attributed to both the burglaries and assault. Accordingly, the trial court erred by failing to instruct with CALJIC No. 2.52 or an equivalent instruction.

3. The trial court's errors in admitting irrelevant and prejudicial other crimes evidence and failing to instruct with CALJIC No. 2.52 requires reversal.

Neither instructional error, nor the erroneous admission of other crimes evidence, requires reversal unless a reasonable probability exists that, absent the error, the jury would have returned a verdict more favorable to appellant. (Evid. Code, § 353, subd. (b); *People v. Falsetta* (1999) 21 Cal.4th 903, 925; *People v. Earp* (1999) 20 Cal.4th 826,

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had a companion or an accomplice on the night in question.

878; *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The prejudicial effect of the evidentiary and instructional errors is a close question. Because appellant did not testify, there was no evidence that he could not see Detective Bruce. However, it was undisputed that it was dark, and most witnesses testified it was raining. Bruce described the rain as "pouring," and "really bad conditions, downpour rain." Detective Razo did not testify he could see Bruce, but instead testified he was looking at appellant and did not look toward Bruce until after he heard a shot fired. By that time, Bruce had moved to his right, back toward Razo and their parked car. Detective Bahash, who blocked appellant's SUV from behind, testified that, while he could see both Razo and Bruce when they first got out of their car, appellant's SUV subsequently blocked his view of Bruce. Parking lot attendant Antonio Aviles, who was inside the ticket booth at the time of the incident, saw Bruce, but did not see Razo or the detectives' car parked on the other side of the exit barrier. Beimnet Demeke, a second parking lot attendant who was situated near the ticket booth, testified she saw both detectives get out of their car, but did not see where they went. After the SUV went around the barrier and Demeke heard a shot, she saw both detectives to the side of the SUV. The evidence was therefore inconclusive as to whether appellant would or would not have been able to see Bruce.

The evidence of appellant's commission of other burglaries was potentially extremely prejudicial for two reasons. First, the evidence tended to show his criminal propensity, implying that he was predisposed to commit crimes. Because no limiting instruction was given, the jury was not precluded from drawing the propensity inference or from taking that inference to its natural conclusion: that appellant was likely guilty of the charged crime because he was predisposed to commit crimes. With limited exceptions inapplicable to the evidence improperly admitted here, the jury is not permitted to rely upon an inference of criminal propensity as proof of guilt of the current charge. (See, e.g., Evid. Code, § 1101, subd. (a); *People v. Daniels* (1991) 52 Cal.3d

815, 880; 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 74, pp. 409-410.) Second, because no mention was made of the vehicular burglaries, not even an instruction not to consider them for any purpose, it would naturally appear to the jury that appellant had not been, and apparently would not be, prosecuted, convicted or punished for any of those burglaries. The erroneous admission of this evidence therefore created an extremely high probability that some, if not all, jurors would rely upon a prohibited propensity inference to fill in gaps or overcome weaknesses in the prosecution's case and believe appellant should be convicted of the assault charge to compensate for the fact he had escaped liability for numerous other crimes.

The trial court's failure to give the statutorily required instruction that the sensational evidence of appellant's flight was not itself sufficient to establish his guilt exacerbated the high potential for prejudice created by the improper evidence of other crimes. The flight evidence showed not a mere departure from the scene under circumstances suggesting a desire to avoid being observed or arrested, but an extremely dangerous high-speed chase, during which he ran red lights, drove at speeds in excess of 120 miles per hour during a downpour, and drove straight toward one of the pursuing police vehicles before loosing control of his SUV and crashing through an iron fence. The circumstances of appellant's flight inevitably suggested to jurors that appellant placed every person in the immediate vicinity of the route he followed in extreme danger. The flight evidence was thus highly inflammatory and likely to evoke a negative emotional reaction from jurors. The prosecutor's argument effectively urged the jury to find that appellant's flight established not only his consciousness of guilt, but to find the disputed elements that he saw Bruce in his path and knew Bruce was a police officer performing his duties because that was "[t]he only reasonable explanation" for appellant driving around the barrier at the payment booth and the unmarked parked car blocking his egress. The broad sweep of the prosecutor's argument was unchecked by the required instruction upon the limits of permissible use of the inflammatory flight evidence.

Accordingly, we believe it reasonably probable that appellant would have

obtained a more favorable result had the jury been properly instructed regarding the limitations upon the permissible use of the flight evidence and had not heard the improperly admitted other crimes evidence. Given the inconclusive evidence upon the primary issue whether appellant saw Detective Bruce and knew he was a peace officer and the existence of lighting and atmospheric conditions under which appellant might not have seen the detective or have been able to identify the badge emblems on his jacket as signifying a police officer, the combined prejudice resulting from the two errors warrants reversal.

4. The trial court did not abuse its discretion in ruling upon appellant's *Pitchess* motion.

Although, in light of the reversal, we need not address the merits of the remaining issues, we address appellant's request regarding discovery of police officer personnel records for appellant's guidance upon retrial.

Appellant filed a motion seeking discovery of identifying information regarding everyone who filed a complaint or was interviewed in connection with any complaint against Detectives/Officers Bruce, Razo, K. Gregow, and D. Foltz alleging actual or attempted aggressive behavior, violence, or excessive force. The trial court initially denied the motion, but subsequently granted it with respect to complaints against Detective Bruce alleging excessive force or filing false reports.[4] The court conducted an in camera review of complaints produced by the custodian of records for the City of Long Beach. It found two relevant complaints against Bruce and ordered them disclosed to appellant.

Appellant requests this court to review the record of the in camera proceedings to determine whether the trial court ordered disclosure of all responsive complaints.

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[4] Appellant apparently filed a new motion seeking complaints alleging the filing of false reports. The renewed motion is not contained in the record.

A defendant seeking discovery of police officers' personnel records and complaints against the officers must file a motion[5] describing the type of records sought and showing, inter alia, the materiality of the information to the subject of the pending action and good cause for disclosure. (Evid. Code, §§ 1043, 1045.) Upon such a showing, the trial court examines the records in camera and discloses only those, if any, that are both relevant to the pending action and are not statutorily excluded from disclosure by Evidence Code section 1045, subdivision (b). (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227.) To facilitate appellate review, the trial court must make a record of what it reviewed by photocopying the documents, making a list of them, or simply stating for the record the documents it reviewed. (*Id.* at p. 1229.) We review the trial court's decision for abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.)

Our review of the reporter's transcript of the in camera review of documents produced by the police department shows the trial court properly exercised its discretion. It examined and described the nature of each complaint produced by the custodian. The only complaint the court did not order disclosed alleged matters other than filing false reports or using excessive force. The court did not abuse its discretion.

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5 Such motions are commonly known as *Pitchess* motions. See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

DISPOSITION

The judgment is reversed.

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BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.